STATE OF NORTH CAROLINA

BEFORE A STATE HEARING REVIEW OFFICER FOR THE STATE BOARD OF EDUCATION PURSUANT TO G.S. 115C - 109.9

A.J., by parent or guardian T.J.
Petitioner

v.

Granville County Board of Education
Respondent

DECISION

10 EDC 2914

This is an appeal of the Decision of Administrative Law Judge Melissa Owens Lassiter issued on September 21, 2010.

The records of the case received for review included:

1. One (1) day of transcript of the hearing.
2. The Official Record of the case issued by the Office of Administrative Hearings; which included the Decision of Judge Lassiter, motions, written arguments, procedural documents, orders, correspondence concerning the case, and Respondent's Exhibits.
3. One (1) volume (folder) of Petitioner's Exhibits.
4. Additional written arguments submitted by both parties to the Review Officer.

The hearing of this case was held before Administrative Law Judge Melissa Owens Lassiter on August 17, 2010 in Oxford, North Carolina.

Appearances:

For Petitioner - T.J., *pro se*; P.O. Box 232, Ridgeway, North Carolina 27570
For Respondent - James E. Cross; Royster, Cross & Hensley, LLP, P.O. Drawer 1168, Oxford, North Carolina

To provide a document that does not have personally identifiable information regarding the Petitioner and/or for convenience, the following will be used to refer to the parties:

For the Child/Petitioner - AJ; the child
For Parent/Petitioner - TJ; Petitioner
For Respondent - Respondent; Granville County Schools; LEA

ISSUES

The parties did not file a Prehearing Order in which they agreed upon the issues. The issues stated by the ALJ are consistent with the issues in Petitioner's Petition for the Hearing and the ensuing correspondence between the parties concerning the Petition. Although the Petitioner's Petition never claimed a denial of a Free Appropriate Public Education, it was proper for the ALJ in this *pro se* case to use correct terminology in stating the issues. The issues stated by the ALJ were:

1. Whether Respondent exceeded its authority, acted erroneously, failed to use proper procedure, or failed to act as required by law or rule, and thereby denied Petitioner a free appropriate public education, by failing to implement AJ's IEP from Vance County Schools, and by changing AJ's placement from a self-contained cross-categorical classroom with a one-on-one assistant, to a separate classroom for resource with "assistance" only during transition times?

2. Whether Respondent offered AJ a free appropriate public education in the least restrictive environment? *(There was not an allegation in the Petitioner's Petition regarding least restrictive environment. Therefore this issue inserted by the ALJ is disregarded by the Review Officer.)*

3. Whether Respondent failed to implement AJ's Behavior Intervention Plan of AJ's IEP, and denied AJ a free appropriate education when Respondent suspended AJ from school for two and one-half days for fighting on the playground?

4. Whether Respondent's policy, that prohibits a student from attending school unless the student provides proof of residency, violates N.C. Gen. Stat. § 115C-378?

LIST OF WITNESSES

Petitioner:

T.J.
Jann A. Shepherd

Respondent:

Amy Miller
Gina Diane Cunningham

EXHIBITS

Petitioner:

A IEP, Vance County Schools, 4/5/10 - 4/4/11
B Prior Written notice and IEP Team Meeting Minutes, Stovall Shaw Elementary School, 5/19/10
C psychological evaluation, 11/20/09 and 12/8/09

D letter from Holly Carroll, 6/22/10
E IEP Team Meeting Minutes, Stovall-Shaw Elementary School, 7/13/10
F progress reports, 1/25/10 - 6/7/10
G letter, Juntunen to Mr. J., 9/9/10

Respondent:

1 *Procedural Safeguards: Handbook on Parents' Rights*, 9/08, Revised 4/09
2 IEP, Vance County Schools, 4/5/10 - 4/4/11
3 Vance County Schools, IEP
4 IEP Team Meeting Minutes, Stovall-Shaw Elementary, 5/19/10
5 Prior Written Notice, IEP, Stovall-Shaw Elementary, 4/5/10, other related documents
6 letter, Miller to Mr. J., 6/1/10
7 Resolution Meeting Form, 6/7/10; other related documents

PRELIMINARY STATEMENT

Judge Lassiter's decision was appealed by the Petitioner on September 28, 2010 and the undersigned was appointed as Review Officer on September 29. The parties were provided a Request for Written Arguments on October 1, with Written Arguments due on October 22. The Decision was to be completed by October 28, 2010, within the 30 day timeline established by 34 CFR 300.515(b) and the *Policies Governing Services for Children with Disabilities*, NC 1504-1.16(b).

Standard of Review by the State Review Officer

The review of this case is in accordance with the provisions of G.S. 115C-109.9 and the *Policies Governing Services for Children with Disabilities*, NC 1504-1.15. The standard of review that must be used by the Review Officer for the State Board of Education is found in *Board of Education v. Rowley*, 458 U.S. 176 (1982). The Supreme Court held that due weight shall be given to the state administrative proceedings. In *Doyle v. Arlington County School Board*, 953 F.2d 100 (4th Cir. 1991), the Fourth Circuit explained *Rowley's* instruction that "due weight" be given to state administrative hearings. *Doyle* reviewed a product of Virginia's two-tiered administrative system. The court first noted, "By statute and regulation the reviewing officer is required to make an independent decision . . .." *Doyle*, 953 F.2d at 104 The court held that in making an independent decision, the state's second-tier review officer must follow the "accepted norm of fact finding."

In North Carolina, District Court Judge Osteen further interpreted this requirement of *Rowley* and *Doyle*. *Wittenberg v. Winston-Salem/Forsyth County Board of Education*, Memorandum Opinion and Order 1:05CV818 (M.D.N.C. November 18, 2008) A State Review Officer (SRO) must follow the same requirements as the courts. The SRO must consider the findings of the ALJ as to be *prima facie* correct if they were regularly made. An ALJ's findings are regularly made if they "follow the accepted norm of fact-finding process designed to discover the truth."

Having reviewed the records of the case, the Review Officer for the State Board of Education independently makes Findings of Fact and Conclusions of Law in accordance with 20 U.S.C. 1415(g); 34 CFR §300.532; G.S. 115C-109.9; and the *Policies Governing Services for Children with Disabilities*, NC 1504-1.15.

The Review Officer finds that the ALJ's Facts appear to be regularly made, but some of the facts are not relevant to the issues. Testimony was allowed regarding an alternative placement for AJ that was agreed upon in a resolution meeting but then rejected by TJ the next day. The Respondent had never included an alternative program in AJ's educational program. This alternative placement was not an issue for this case, thus the Review Officer finds no Facts and makes no Conclusions regarding this alternative placement. With this exception, the Review Officer's Findings of Fact are consistent with those of the ALJ, although often stated in a slightly different manner. The Review Officer concurs with and uses many of the ALJ's Facts. The Review Officer has, in some instances, consolidated the information from testimony and exhibits into a reduced number of Facts. Those eliminated are usually recitations of testimony, redundant, or those that have no bearing on the issues of the case. The overall impression one gets when reading all the ALJ's Facts and the Review Officer's Facts is basically the same.

Some of the Review Officer Conclusions of Law are stated differently but are consistent with those of the ALJ and supported by IDEA, Federal Regulations, and state law. A few necessary conclusions have been added. None of the Conclusions reached by the Review Officer are wholly inconsistent with those of the ALJ.

To the extent that the Findings of Facts may contain Conclusions of Law, or that the Conclusions of Law may include Findings of Fact, they should be so considered without regard to the given labels.

FINDINGS OF FACT

1. TJ is the father of AJ and at all times relevant to this action has resided in Granville County, North Carolina. There is no dispute about whether AJ qualifies for special education services pursuant to the Individuals with Disabilities Education Improvement Act (IDEA). 20 U.S.C. §1400 *et seq.* He has been identified as having a Serious Emotional Disability (SED) and has received the psychological diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder (ODD).

2. The Respondent is a local education agency (LEA) receiving funds pursuant to IDEA and was responsible for providing special education to AJ pursuant to Article 9, Chapter 115C, of the North Carolina General Statutes.

3. At the time of the hearing AJ was eight years old. Before transferring to Respondent's school system in April 2010, AJ attended E.O. Young Elementary School in Vance County during the 2009-10 school year. While attending E.O. Young, AJ had an IEP, and a Behavioral Intervention Plan ("BIP").

4. On April 5, 2010, AJ's IEP Team at Vance County Schools had conducted an annual review and developed a new IEP for the 4/5/2010 - 4/4/2011 period. The IEP Team determined that AJ would continue to be served in a self-contained cross-categorical classroom five times a week for 360 minutes, would continue to receive speech services two times a week for 30 minutes, and would receive transportation services as a related service. The Team found the April 8, 2009 FBA continued to be accurate. The Team did, however, develop a new BIP to focus on AJ's argumentative behaviors with adults and with AJ's outbursts. AJ's new BIP noted that the primary areas of behavioral concern for AJ were:

> Behavior 1: AJ has difficulty understanding appropriate practices of social interaction with students.
> Behavior 2: AJ often has outbursts and can be verbally aggressive and argumentative.

5. The Vance County IEP also provided a 1:1 assistant for the entire school day to assist AJ with issues of communication, mutual respect, and positive behavior. (Pet. Ex. A)

6. On April 12, 2010, AJ was enrolled by his father in Respondent's Stovall-Shaw Elementary School, which he attended for the remainder of the 2009-10 school term.

7. On May 5, 2010, AJ was playing football on the playground at Stovall-Shaw Elementary. AJ grabbed another student around the neck, and started choking the student. AJ's assistant and Petitioner TJ were talking on the other side of the playground. The father, TJ, and AJ's assistant intervened, and AJ reported to the principal's office. When asked why he choked the student, AJ repeatedly claimed he was just trying to get the football. Kathy Twisdale, principal at Stovall-Shaw Elementary, suspended AJ for two days for choking the student on the playground.

8. Soon after receiving AJ's records from Vance County, the Respondent convened an IEP Team meeting on May 19, 2010 to discuss transitioning AJ into Granville County Schools. The Team discussed parental concerns, reviewed AJ's current IEP/BIP, and considered teacher input. Principal Kathy Twisdale, Regular Education teacher Holly Carroll, Special Education teacher Robynne Williams, Behavioral Specialist Gina Cunningham, Exceptional Child's Director Amy Miller, and TJ attended the meeting.

9. In the IEP meeting TJ advised that he had not been receiving a daily report or schedule for AJ, and wished to receive that. TJ advised that AJ needs 1:1 services with an assistant as required by the Vance County IEP. TJ also indicated that AJ's 2-day suspension, a few weeks before for a physical altercation on the playground, was unwarranted because of AJ's disability. TJ thought that AJ's assistant was not located close enough to AJ on the playground while AJ was playing football. TJ thought AJ got into the physical altercation because the assistant was not within arms reach of AJ to stop him.

10. During the May 19, 2010 IEP meeting, the Team amended the Vance County IEP that had been developed on April 5, 2010. The amended IEP was now officially a Granville County IEP. In amending the IEP the Team kept the bulk of the IEP intact, including the BIP. The Team changed only several portions. The changes made were:

a. Change placement from a self-contained cross-categorical classroom to a separate classroom setting for resource,

b. Eliminate the 1:1 assistant all day but provide a support person during transition times such as PE, recess, and lunch,
c. Exit special transportation as a related service, and
d. The addition of a daily report to TJ on AJ's behavior, via a behavior log and schedule.

(Pet. Ex. B, DEC 5 dated May 19, 2010)

11. At the May 19, 2010 IEP meeting, the IEP Team removed transportation as a service, because AJ no longer needed transportation. AJ had transportation in Vance County schools because he attended a day treatment facility there. Vance County had assigned a behavioral specialist as a one-on-one to AJ when AJ transitioned from day treatment to EO Young Elementary School.

12. TJ expressed his concerns at the May 19, 2010 meeting. He wanted the special 1:1 assistant continued all day. Because of AJ's disability, TJ also wanted AJ to be exempt from discipline "per board policy" that was included in the BIP.

13. On May 24, 2010, TJ filed a contested case petition with the Office of Administrative Hearings requesting a due process hearing on the following issues:

a. Respondent failed to implement AJ's IEP from Vance County schools requiring a student assistant during the whole school day.
b. When determining discipline for a child with disabilities, Respondent refused to consider [discipline] on a case-by-case basis.
c. Respondent failed to recognize the unique circumstances clause of 34 CFR §300.
d. Respondent's policy that prohibits students from attending school as to provide proof of residency violates N.C. Gen. Stat. § 115C-378.

14. On July 13, 2010, Respondent and Petitioner TJ, along with an attorney, attended a resolution meeting. The parties reached, and signed, an agreement resolving this contested case, whereby AJ would attend Respondent's alternate behavior school, known as "The Achievement School" for a 4½ week trial placement.

a. AJ would attend an elementary class at The Achievement School with a certified teacher. There would be three elementary students in the class. The older students would not eat, have recess, or have any academic classes with any elementary students.

b. Academics would be addressed first, but behavioral challenges would also be addressed continually, and replacement behaviors addressed with positive behavior support. Either Director Gina Cunningham or other teachers involved with AJ's daily activities would provide daily emails to TJ regarding AJ's daily academics and issues. If AJ were the only elementary student, then no TA floater would be needed. If there were other students in the classroom, then a TA floater would be assigned to the class. After the 4½-week trial period, the IEP Team would meet to assess AJ's progress, and determine AJ's placement for after the trial period. (Pet. Ex. E)

15. On July 14, 2010, the Petitioner withdrew his consent to the July 13, resolution.

16. As the parties did not reach resolution, the Hearing in this case was held on August 17, 2010.

17. During the Hearing, TJ testified that the behavior incident on May 5 during which AJ choked another student would not have occurred had AJ been provided a full-time assistant who would have been close to the activity and would have intervened quicker. (Tr. pp. 18-19)

18. TJ contended that AJ should not have been suspended under Respondent's general discipline policy, as AJ's choking of the student was due to AJ's disability. If AJ's behavior was due to his disability, AJ's punishment should have been restricted to a one-day suspension as AJ's BIP required, "Out of school suspension 1 day suspension per incident." (Pet. Ex. A, p. H, IV, 7)

19. In Testimony TJ also explained how he did not believe AJ should attend an alternative school, because he had not spent enough time in Stovall-Shaw Elementary. That is, TJ thought Respondent did not enough information to make a good determination whether AJ should be transferred to a more restrictive environment, such as Respondent's alternative school. TJ has always tried to keep AJ in the least restrictive environment. In the past, AJ tried a separate alternative school in Vance County Schools, before AJ went to E.O. Young, and it did not work. "It just was not a positive fit." (Tr. p. 22)

20. TJ further explained that the alternative school would do many things differently from a regular school. First, AJ would be restricted from other students as he would be the only student in the elementary program. TJ thinks that AJ should have a right to be around students that do not have disabilities, so he can learn how to interact with people that do not have disabilities. Second, AJ has not exhibited any type of behavior at Stovall-Shaw that would cause AJ to be located in a place where he is confined, or not visible with the general population of students. TJ opined that a least restrictive environment is the best thing for AJ right now. In addition, there is no documentation on Respondent's alternative school program; there is nothing on the web about it, and nothing in writing about it as Respondent is just starting the alternative school for elementary students. The program is not even in place yet. (Tr. pp. 22-23)

21. During testimony TJ opined that AJ needs a special education tutor, not a regular tutor. They tried a regular tutor before at E.M. Rollins in Vance County, and the tutor could not handle AJ because of his behavior. It just did not work. TJ is asking for a tutor for AJ, because he is going into fourth grade, but operating on a second grade level, and is behind. Providing a tutor for AJ, however, was not one of the issues in the Petitioner's petition.

22. TJ testified that when Ms. Juntunen evaluated AJ and made recommendations regarding his treatment, a 1:1 assistant was not being considered. Nevertheless, Ms. Juntunen's recommendations are still helpful in determining what the best learning environment is for AJ.

23. After the end of the 2009-2010 school year, TJ asked Ms. Jann Shepard to assist him in getting his son's educational needs met. Ms. Shepard was a certified teacher from preschool through 12th grade in the areas of behaviorally emotional, mentally challenged, autistic, and learning disabilities. She spent 35 years teaching in those areas in various school systems in Arizona and North Carolina. She recently retired from the Chapel Hill schools. Now, she works full-time as an

advocate, conducts many evaluations, and works with neuropsychologists, psychologists, and neuro-psychiatrists. She has testified numerous times as an expert witness.

24. Ms. Shepard reviewed AJ's IEPs from Vance County and Granville County, the minutes from the Respondent's IEP meetings, and some other records. Since TJ contacted her after school was over, Ms. Shepard did not observe AJ in school, or evaluate AJ. In comparing the Vance County IEP for AJ with the Respondent's IEP for AJ, she thought they looked much the same. There were no direct changes to the goals and objectives and no direct changes in modifications and accommodations, other than the one-on-one assistant not being provided. There was also no change in the BIP. (Tr. pp. 52-53)

25. Ms. Shepard questioned what data did Respondent use to consider changing AJ's classroom setting from self-contained cross-categorical to the alternative behavioral school. (Tr. p. 58) As no assignment to an alternative behavioral school was ever made, this testimony was irrelevant.

26. Petitioner TJ explained that AJ does better with a male role model. In Vance County schools, AJ did a much better with one-on-one, as there was somebody to help him read, somebody to help him do his math, and somebody to help him with his behavior. One of the reasons TJ wanted AJ to have a 1:1 assistant during school was that a 1:1 assistant would help keep AJ from being placed on any type of disciplinary action or from being suspended from school. (Tr. pp. 46-47)

27. In November and December 2008, Tammy Juntunen, a licensed Psychological Associate, conducted evaluations of AJ. In Petitioner's Exhibit F are Juntunen's written evaluations and suggestions for treating AJ's disruptive behaviors, learning difficulties, and inattention problems. At the hearing, TJ pointed out that Ms. Juntunen suggested that they should ignore AJ's negative behaviors, as AJ likes attention, and instead, focus on AJ's positive behavior. (Pet. Ex. F, pp. 14, 2)

28. Ms. Juntunen recommended AJ's IEP Team continue addressing AJ's disruptive behaviors and academic struggles with a behavior plan that focuses on and rewards positive behaviors. She explained that, "His behavior in the classroom should be evaluated for a baseline of appropriate behaviors. Based on this baseline, time increments can be used." (Pet. Ex. G, p. 14)

29. Ms. Juntunen noted, "AJ may benefit from sitting in close proximity to students who model appropriate classroom behaviors." (Pet. Ex. G, p. 15) She recommended AJ "would likely benefit from structured or peer activities that allow him to excel," such as being paired with a younger child whom AJ could help. (Pet. Ex. G, p. 17) Additionally, "AJ may need encouragement to learn ways of handling social situations appropriately and successfully without conflict." Role-playing was a method of practicing these skills. (Pet. Ex. G, p. 17) Juntunen encourages teachers (and parents) to create opportunities for appropriate behavior to occur, such as AJ can assist in classroom demonstrations. (Pet. Ex. G, p. 14)

30. In testimony, TJ argued that Respondent violated AJ's rights when Respondent prohibited AJ from attending school until he provided proof of residency. Respondent has a policy that prohibits students from attending school until the student has presented documentation showing

proof of residency. When TJ spoke with Respondent's superintendent, the superintendent told TJ that either you have the documents or you do not. If you do not have them, then you just can't come. TJ argued that a child should not be prohibited from going to school just because that parent cannot produce the documentation at that time. The child should be allowed a certain amount of time for a parent to produce documentation of residency. The Petitioner, however, produced no evidence that TJ was denied the opportunity to attend Respondent's schools or that his enrollment was delayed. AJ actually did enroll in Respondent's school on April 12, 2010.

31. In testimony Ms. Miller, the Respondent's Exceptional Children's Director, explained that when AJ transferred into Granville County schools there was a current IEP from Vance County schools. When TJ explained that AJ had a one-on-one assistant, Respondent contacted its Achievement Center, and had Tony Coghill, a behavioral specialist, observe AJ. (Tr. p. 72)

32. Ms. Miller explained that Ms. Williams and Ms. Splees were AJ's special education teachers at Stovall-Shaw Elementary. Miller described how AJ and Ms. Williams "clicked. . .It just worked. . . She requires quite a bit of work out of him, and he does it. She is—they have a great rapport." (Tr. p. 74)

33. Ms. Miller explained that the IEP Team removed AJ's 1:1 assistant that was in the previous IEP because AJ spent the primary amount of his day with two special education teachers. Those teachers could redirect AJ, teach AJ social skills, and instruct AJ when a behavior was inappropriate, and what he could do instead. (Tr. pp. 74-75) Behavioral Specialist Tony Coghill spent time with AJ, and indicated that AJ just needs simple redirection during his transition times. Coghill is trained in that, and is in his fifth year of doing that. (Tr. p. 75) AJ's classroom teacher explained that AJ "needs redirection from us. He needs to know that the teachers are in control of the classroom." (Tr. p. 76)

34. Ms. Miller testified that the services Respondent is offering AJ were comparable, and actually better services than the services AJ was receiving in Vance County. Two qualified special education teachers, not a paraprofessional, are redirecting AJ and teaching him social skills. You must train a paraprofessional, and it takes a good while to train a really good paraprofessional to be a behavior interventionist. (Tr. pp. 76-77)

35. Ms. Miller testified that after observing AJ for about one month, the IEP Team felt that the teacher, not a paraprofessional, was responsible for AJ. (Tr. p. 74) Miller noted that even Ms. Juntunen's recommendation does not mention a paraprofessional or a 1:1. Her recommendations specify "the teacher" should provide various types of support. (Tr. p. 75)

36. Ms. Miller testified that on May 19, 2010, the IEP Team made a "Team decision" to amend AJ's IEP by changing the level of services provided to AJ, from providing a 1:1 assistant the entire school day to providing 1:1 assistance to AJ only during the transition times, such as lunch, PE, and recess. The IEP Team's decision was the most appropriate decision, based on the data they had gathered, the information from AJ's teachers, and Mr. Coghill's information. Ms Miller thought that transition from a one-on-one to "assistance" was a step in the right direction. (Tr. p. 85) "Assistance" during transition times means that the teacher and/or teacher assistant who accompany AJ during transition time can redirect AJ if he needs redirection. This would apply to PE, lunch, recess, or between classes. Any other time, AJ is in a classroom with a teacher who can redirect

him. AJ would never be allowed in the hallway unsupervised. (Tr. pp. 106-07) Petitioner TJ, who was at the meeting, was not pleased with the decision. (Tr. p. 78)

37. Ms. Miller opined that she thought that suspending AJ for choking another student was an appropriate punishment that the principal could administer. AJ's physically choking another child was beyond the simple aggression mentioned in the BIP. It was a severe act. (Tr. pp. 79-80)

38. During the May 19, 2010 meeting, TJ had told the Team that he wanted a one-on-one assistant with AJ during school, so AJ would not face disciplinary actions. Ms. Miller testified that the IEP Team explained to TJ that the only behaviors that would be addressed by the seven consequences in the BIP were the behaviors that were addressed in the BIP. In other words, the BIP deals with verbal aggression, and inappropriate interaction with peers. Physically attacking a child becomes a severe episode that is not addressed in the BIP. (Tr. pp. 78-79)

39. Ms. Miller also showed page 21 of the Parents Rights Handbook to TJ during the May 19 meeting. Page 21 explains the school disciplinary policy used to suspend AJ. Under that school policy, a principal has the right to implement board policy on a case-by-case basis, and discipline a child who has a disability, as their regular peers are disciplined. The principal has the legal authority to hold a child [with a disability] to the same type of policies. (Tr. pp. 79-81) The school principal has the authority to remove a child who violates the code of conduct; thus, the two-day suspension for choking on the playground was up to the principal. (Tr. p. 86)

40. During cross-examination, when questioned about AJ's two-day suspension from school, Ms. Miller reiterated that AJ's current BIP states that the behavioral consequences in the BIP specifically apply to behaviors listed in the BIP. The BIP also states that should AJ engage in other behaviors, especially more severe behaviors, then AJ will be disciplined according to board policy. (Tr. pp. 112-114) Ms. Miller elaborated that, by board policy, Principal Twisdale could have suspended AJ for three days for his aggressive act of choking another student. The principal, however, considered AJ's situation, and only suspended him for two days. (Tr. p. 112)

41. After the May 19, 2010 meeting, Ms. Miller thought things were going well. She felt that changing AJ's 1:1 "assistant" to "assistance" ensured that AJ had a teacher who could redirect him during any transition. "We felt confident with that, and AJ was doing well." ". . . [H]e developed quite a rapport with Ms. Williams." (Tr. p. 83)

42. At the hearing, Ms. Miller described Stovall-Shaw as a small rural school with a real family environment. She thought that the family environment was the reason AJ liked Stovall-Shaw. Everybody there likes AJ and speaks to him. (Tr. p. 96) AJ attended Stovall-Shaw long enough to see improvement, but Respondent would like to see more. Ms. Miller thought AJ's IEP at Stovall-Shaw was working. Nonetheless, she would like to see AJ's IEP implemented at The Achievement Center, which was agreed upon, then withdrawn, at the resolution meeting for this case. She would like to "see how well he can do when there are not other factors that distract him." (Tr. p. 97) Ms. Miller would like to see AJ have the "opportunity to be in a really small environment, move his academics forward, as well as teach him some behavioral self-monitoring skills," so when AJ moves back into the regular setting, he's prepared and doesn't fail. (Tr. p. 97)

43. Ms. Miller acknowledged that the "data" upon which the IEP Team relied to move AJ from a 1:1 assistant to "assistance" only during transition times, was neither written nor reflected in the IEP meeting minutes. Miller noted that the minutes from the IEP meetings are summaries, not verbatim recitations, of the IEP meetings. Miller explained that the bases for that decision were the verbal discussions and/or input from AJ's teachers during the IEP meetings. AJ's teachers did not file written reports with the IEP Team. The teachers' input included how they had to redirect AJ, how they redirected AJ, things that he said, and things that he did. (Tr. pp. 105-106)

44. As she was unable to testify at the hearing, Ms. Juntunen, AJ's psychologist, by letter dated August 9, 2010, explained that she had been seeing AJ since October 28, 2009. She opined that AJ is "capable of doing work at his grade level" given her prior evaluation of AJ. She is aware however, that AJ has been unable to remain in the regular classroom setting due to his behavior. Juntunen believes AJ needs:

> [A] high degree of structure and discipline; however, I also believe he should be given the opportunity to first fail in the regular school setting, given this is his father's preference. If A does not comply with school rules, I believe there should be some specific guidelines in place that would send him to the 'Alternative School.'
> (Pet. Ex. G)

45. Substantial testimony was introduced regarding the Respondent's Achievement Center, or alternative setting that was agreed upon at the resolution meeting prior to the hearing, but withdrawn by the Petitioner. Even though Respondent's witnesses strongly felt that this alternative setting or alternative school would have provided an excellent opportunity for AJ and that he would have benefited, it was never a part of AJ's educational program. The testimony concerning this alternative placement, therefore, was not relevant to the issues in this case.

46. The Petitioner made allegations in the initial petition and testified briefly that the Respondent had a policy that prohibits a student from attending school unless the student provides proof of residency. The Petitioner never introduced any evidence regarding this policy nor did the Petitioner claim that AJ was ever denied attendance by the Respondent.

47. Judge Lassiter issued a Final Decision on September 21, 2010, stating:

> Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned finds that Respondent's IEP and placement of AJ was appropriate to address AJ's special needs so as to provide him with FAPE in the least restrictive educational environment.

48. The Petitioner filed Notice of Appeal of the ALJ's Decision on September 28, 2010. The appeal was filed in accordance with G.S. 115C-109.9 with the Exceptional Children Division of the North Carolina Department of Public Instruction.

49. The undersigned was appointed as Review Officer on September 29, 2010. A Request for Written Arguments was sent to the parties on October 1, 2010. Written Arguments were received from the Petitioner on October 14, 2010. The Respondent submitted Written Arguments on October 25, after the deadline. It was then discovered that the Respondent's Arguments were timely submitted on the October 22 deadline via email, using the correct address. AT&T had somehow not delivered them until inquires were made on October 26. As the Respondent's Arguments were timely submitted in accordance with the Review Officer's instructions, they were considered.

Based on the Findings of Fact, the Review Officer for the State Board of Education makes Conclusions of Law independently of those of the ALJ. They are consistent with those of the ALJ. A few are essentially the same, but many utilize law not included in the ALJ's Decision. Those added are consistent with IDEA, state law, federal regulations, state policies, and court interpretations. The Review Officer makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings and the Review Officer for the State Board of Education have jurisdiction over this case pursuant to Chapters 115C, Article 9 of the North Carolina General Statutes; NC 1500 *Policies Governing Services for Children with Disabilities*; the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. §1400 et seq.; and IDEA's implementing regulations, 34 C.F.R. Part 300.

2. IDEA was enacted to "ensure that all children with disabilities have available to them a Free Appropriate Public Education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. §1400(d)(1)(A), IDEA; the implementing federal regulations, 34 C.F.R. Part 300; G.S. 115C - Article 9; and NC 1500 *Policies Governing Services for Children with Disabilities*. All these provisions have specific procedures that an LEA must follow in making FAPE available.

3. Respondent is a local education agency receiving monies pursuant to 20 U.S.C. §1400 et seq. and the agency responsible for providing educational services to students enrolled in Granville County. The Respondent is subject to the provisions of applicable federal and state laws and regulations, specifically 20 U.S.C. §1400 et seq.; 34 C.F.R. Part 300; G.S. 115C, Article 9; and the North Carolina *Policies,* NC 1500. These acts and regulations require the Respondent to provide FAPE for those children in need of special education.

4. AJ is a child with a disability for the purposes of IDEA, 20 U.S.C. §1400 *et seq.* and a child with special needs within the meaning and definition of G.S. 115C-106.3(1). AJ was enrolled in Respondent's school during the period relevant to this controversy. Being classified as having a serious emotional disability, AJ is entitled to a free appropriate public education (FAPE) from the Respondent.

5. G.S. §§115C, 109.6 - 109.9 and the *Policies* (NC 1504, 1.8 - 1.16) provide the guidelines to be used in the hearing and administrative review process. The hearing by the ALJ and review by this Review Officer are required to be conducted in accordance with these provisions.

6. A free appropriate public education (FAPE) that must be made available to all eligible children is defined by IDEA, 20 U.S.C. §1401(9):

> FREE APPROPRIATE PUBLIC EDUCATION - The term 'free appropriate public education' means special education and related services that -
> (A) have been provided at public expense, under public supervision and direction, and without charge;
> (B) meet the standards of the State educational agency;
> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
> (D) are provided in conformity with the individualized education program required under section 614(d).

7. A free appropriate public education has also been defined as that which provides a child with a disability with personalized instruction and sufficient support services to enable the student to benefit from the instruction provided. The individualized educational program (IEP) must be reasonably calculated to enable the child to receive benefits. *Board of Education v. Rowley*, 458 U.S. 176 (1982); *Burke County Board of Education v. Denton,* 895 F.2d 973 (4th Cir. 1990).

8. In *Schaffer v. Weast,* 546 U.S. 49 (2005), the Supreme Court decided that parents who challenge educational decisions made by schools have the burden of proof in due process hearings. Thus, the Petitioner has the burden to show by a preponderance of evidence that the Respondent did not offer AJ a FAPE. For the reasons set forth in the following, the Petitioner has not met this burden.

9. In Board of Ed. v. Rowley, 458 U.S. 176, 206 (1982) the Supreme Court established both a procedural and a substantive test to evaluate compliance with the IDEA. The Court provided:

> First, has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Acts' procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

10. If there is a procedural violation of the IDEA, it must be determined whether the procedural violation either (1) resulted in the loss of an educational opportunity for the child, or (2) deprived the child's parents of the right to meaningfully participate in the development of the child's IEP. *M.M. ex rel. D.M. v. Sch. Dist. of Greenville County*, 303 F.3d 523 (4th Cir. 2002). In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or caused a deprivation of educational benefit. 20 U.S.C. 1415(f)(3)(e).

11. G.S. 115C-109.8 provides that in matters alleging a procedural violation, the hearing officer may find that a child did not receive FAPE only if the procedural inadequacies either impeded the child's right to FAPE, significantly impeded the parents opportunity to participate in the decision making process, or caused a deprivation of educational benefits. The Petitioner has not met the burden of showing any of these.

12. The Petitioner claimed that Respondent failed to implement the Vance County IEP and provide a 1:1 assistant following transfer to Respondent's school. The applicable requirements that the Respondent must follow are found in 34 CFR 300.323(e). North Carolina has adopted the same requirements in NC 1503-4.4(e).

> (e) *IEPs for children who transfer public agencies in the same State.*
> If a child with a disability (who had an IEP that was in effect in a previous public agency in the State) transfers to a new public agency in the State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide FAPE to the child (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency either—
> (1) Adopts the child's IEP from the previous public agency; or
> (2) Develops, adopts, and implements a new IEP that meets the applicable requirements in §§ 300.320 through 300.324.
> 34 CFR 300.323(e)

13. In this case, the preponderance of the evidence showed that Respondent complied with the procedures. It held an IEP meeting as soon as possible after receiving AJ's records and amended AJ's IEP on May 19, 2010. The Respondent made only a few modifications in the IEP, adopting most of Vance County's previous IEP. The elimination of the 1:1 assistant was the only change that was challenged by the Petitioner.

14. The evidence further showed that the May 19 IEP met the requirements set forth in 34 CFR 300.323(e), and that placement in a separate resource classroom with assistance support only during transition times was reasonably calculated to enable AJ to receive educational benefit. The primary assistance support was to be provided by the two qualified special education teachers in AJ's classroom rather than the 1:1 assistant. The Petitioner made significant arguments that this was not comparable as required by 34 CFR 300.323(e). There is actually no requirement the services be comparable once the Respondent has developed a new IEP. 34 CFR 300.323(e)(2) Regardless, the Review Officer finds the assistance support services comparable in that they are "similar" or "equivalent" to those previously provided by Vance County. In fact, the new assistance services are probably better in meeting AJ's needs.

15. An IEP Team's determination is normally entitled to substantial deference. In *Hendrick Hudson Dist. Bd. Of Ed. v. Rowley,* 458 U.S. 176, 206 (1982), the Court said that one must defer to these decisions as long as a procedurally proper IEP has been formulated and the child is provided the basic floor of opportunity. This was reinforced by the Fourth Circuit in *Tice v. Botetourt County School Board,* 908 F.2d 1200 (4th Cir. 1990). One should be reluctant to second-guess the judgment of educational professionals simply because one disagrees with them. Therefore, the Review Officer must defer to the IEP Team's decisions in this case because those decisions were clearly made in accordance with the law. The Review officer, therefore, finds that under the standard set by *Rowley*, the Respondent developed an IEP that would provide FAPE to AJ.

16. The preponderance of the evidence showed that the May 19, 2010 IEP was reasonably calculated to provide educational benefit to AJ and would provide FAPE. The Respondent has complied with the required substantive and procedural requirements of Federal and North Carolina law.

17. Since Respondent never amended AJ's IEP and changed AJ's placement to The Achievement Center, any issues regarding The Achievement Center were not before the Review Officer. Significant time in the hearing was devoted to The Achievement Center, but it was not relevant to the issues in this case.

18. The Petitioner also claimed that the Respondent failed to implement AJ's BIP in that AJ was suspended for physically choking another student on the playground. The Petitioner tried to argue that the failure to provide the 1:1 assistant included in the Vance County IEP contributed to the behavior. When the Respondent learned of the 1:1 from the father before receiving AJ's records form Vance County, the Respondent arranged for temporary assistance to be provided by Tony Coghill during transition activities until the records could be reviewed and an IEP meeting held. It was during this brief interval that the choking incident occurred. Tony Coghill was present on the playground at the time and intervened promptly. The Petitioner failed to show that the lack of the 1:1 assistant contributed to AJ's behavior in this instance.

19. The Petitioner also claimed that the Respondent failed to implement AJ's BIP in that the BIP provided the consequences for AJ's behaviors. The evidence showed that AJ's BIP did provide consequences for AJ's behaviors that were specifically addressed in the BIP, but that AJ's behavior would be subject to the disciplinary procedures in Respondent's code of conduct if AJ's behavior were more severe. Physically choking another child was not included in the BIP, but included in the code of conduct. It could be interpreted as "more severe."

20. 34 CFR § 300.530(b)(1) states that a school district may suspend a student with a disability who violates the district's code of conduct for up to ten school days in a school year to the same extent that a student without disabilities would be suspended. The preponderance of the evidence showed that Respondent was authorized under 34 CFR § 300.530(b)(1) and the BIP to discipline AJ for violating Respondent's code of conduct on May 5, 2010.

21. The Petitioner also argued that the Respondent, when it decided to suspend AJ from school for two days for the choking incident, refused to consider AJ's individual case, the unique circumstances about AJ, his disabilities, and the circumstances. The "unique circumstances" clause of 34 CFR §300.530(a) provides that:

> [S]chool personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of this section, is appropriate for a child with a disability who violates a code of student conduct.

22. The preponderance of the evidence showed that the Respondent did consider AJ's individual case and the unique circumstances. It followed the BIP, which stated that more severe behaviors would be handled under the code of conduct. Interpreting choking as a "more severe" behavior was reasonable. The principal also reduced the suspension to two days from the required three days in the code of conduct for this type of offense, based on the unique circumstances.

23. The Petitioner claimed that Respondent's policy requiring proof of residency before attending school violated AJ's right to attend school and receive FAPE. No evidence, however, was introduced to show that AJ was ever denied the right to attend Respondent's school. Had he been denied the opportunity to receive FAPE where he resides, then 20 U.S.C. 1412(a)(1)(A) and G.S. 115C - 107.1(a)(1) would apply. These acts require the Respondent to provide FAPE to all children with disabilities who reside within its jurisdiction. The Petitioner, however, was challenging Respondent's policy concerning proof of residency required, not a refusal to admit to Respondent's school. This is not a claim that can be considered in a due process hearing conducted under IDEA.

24. The Petitioner failed to meet the burden of showing that the Respondent did not provide FAPE to AJ or that it acted contrary to IDEA (20 USC §1400 et seq.), North Carolina Law (GS 115C - Article 9), and the implementing federal and state regulations (34 C.F.R. Part 300 and NC 1500). The preponderance of the evidence shows that the Respondent acted in accordance with the requirements of these mandates and provided FAPE to AJ.

DISCUSSION

The intent of this section is to provide some insight into the Review Officer's reasoning. It incorporates some elements of both the Facts and Conclusions and is not intended to be a substitute for either.

It appears that this case originated solely because the Petitioner was unsatisfied with the Respondent's actions concerning three issues, which will be discussed in chronological order. First it appears that the Petitioner had to supply proof of residence to enroll his child. While it is true that a FAPE must be provided to a child with a disability where he resides, the Petitioner never submitted any evidence that the Respondent refused to provide that FAPE. Instead, his complaint was concerning the policy that required him to submit proof of that residency. A due process hearing brought under IDEA is not the venue to challenge a school board policy if there has been no denial of the opportunity to receive FAPE.

The second issue was the suspension of AJ for choking another child on the playground. The Petitioner made it clear that he wanted AJ to be exempt from discipline because of his disability. IDEA, however, is clear that children with disabilities are subject to discipline. The Petitioner participated in formulating the BIP that was a part of AJ's IEP, and never challenged it. The BIP was clear. For severe behaviors the school code of conduct would be followed. The school principal's classifying choking as "severe" was reasonable, yet still reduced the suspension required by the code of conduct because of the unique circumstances. The Petitioner also claimed that not having a 1:1 assistant for AJ contributed to the choking incident, for having the assistant would have prevented the incident. His argument was not convincing, for both he and the Respondent's behavioral specialist were present and the behavior still occurred.

The third issue was the IEP of May 19, 2010. The Petitioner objected to the lack of a full-time 1:1 assistant being assigned to AJ by the IEP Team. The previous IEP in Vance County had included the 1:1 assistant and the Petitioner wanted it continued. The IEP Team discussed the assistant but decided that a better arrangement would be to provide assistance services with the two specially trained teachers in AJ's classroom. The teacher-pupil ratio for the classroom was very low and the Team felt that the specially trained teachers would provide better supervision. An assistant would be provided to AJ during transition times. This decision of the IEP Team appears to be reasonable.

One should be reluctant to second-guess the judgment of educational professionals simply because one disagrees with them. In *Hendrick Hudson Dist. Bd. Of Ed. v. Rowley,* 458 U.S. 176, 206 (1982), the Court said that one must defer to these decisions as long as a procedurally proper IEP has been formulated and the child is provided the basic floor of opportunity. This was reinforced by the Fourth Circuit in *Tice v. Botetourt County School Board,* 908 F.2d 1200 (4th Cir. 1990). In reviewing the decisions of IEP teams and other educational professionals, ALJs and Review Officers must defer to those decisions if those decisions were clearly made in accordance with the law.

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned enters the following:

DECISION

The Review Officer holds that:

1. The Respondent's IEP of May 19, 2010 was appropriate and would provide FAPE. The IEP Team's decision not to provide the 1:1 assistant that was provided by the previous IEP was made in accordance with law.

2. The Respondent followed the Behavior Intervention Plan (BIP) that was incorporated in the IEP. The decision of the Respondent to suspend AJ for the choking incident on May 5, 2010 was made in accordance with the BIP and the law.

3. AJ was never denied admission to or the opportunity to receive FAPE from Respondent's schools. A due process hearing brought under IDEA is not the appropriate venue for challenging the Respondent's policy requiring proof of residency.

This the 27 th day of October, 2010.

_____
Joe D. Walters
Review Officer

NOTICE

Any party aggrieved by this Decision may institute a civil action in state court within 30 days after receipt of this Decision as provided in G.S. 115C - 109.9 or file an action in federal court within 90 days as provided in 20 U.S.C. §1415. Please notify the Exceptional Children Division, North Carolina Department of Public Instruction, in writing of such action so that the records for this case can be forwarded to the court.

CERTIFICATE OF SERVICE

I hereby certify that this Decision has been duly served on the Petitioner, Respondent, and their counsels by U.S. Mail, addressed as follows:

Theodore Justice
PO Box 232
Ridgeway, NC 27570
Ajust222@yahoo.com
Petitioner, *pro se*

James E. Cross, Jr.
Royster, Cross & Hensley, LLP
P.O Drawer 1168
Oxford, NC 27565
jcross@roystercross.com
Attorney for Respondent

Office of Administrative Hearings
State of North Carolina
6714 Mail Service Center
Raleigh, NC 27699-6714

Dr. Tim Farley, Superintendent
Granville County Schools
PO Box 927
Oxford, NC 27565-0927
Respondent

Mary N. Watson, Director
Exceptional Children Division
N.C. Department of Public Instruction
6356 Mail Service Center
Raleigh, NC 27699-6356

This the 27 th day of October, 2010.

_____
Joe D. Walters
Review Officer